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EXAMINER

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3621

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/630,595
Filing Date: August 01, 2000
Appellant(s): RAU ET AL.

Nancy J. Flint
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed June 4, 2007 ("Second Appeal Brief"), the reply brief filed February 6, 2009 ("First Reply Brief"), and Return from the USPTO

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Appeal Center appealing from the Office action mailed October 26, 2007 ("Final Office Action"). Because the Appeals Center returned the Examiner's Answer, a new Examiner's Answer must be mailed. Because a reply brief was filed after the return by the Appeal Center, the Examiner will address the arguments made in the First Reply Brief.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the Second Appeal Brief.

(2) Related Appeals and Interferences

The following are the related appeals, interferences, and judicial proceedings known to the examiner which may be related to, directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal:

Appellant's filed a Notice of Appeal on March 10, 2004 in related patent application serial no. 10/143,581, and filed an Appeal Brief on May 6, 2004. The examiner in the related case filed an Examiner's Answer on July 29, 2004. The examiner in the related case was affirmed on September 10, 2008. Related patent application serial no. 10/143,581 is a divisional of the Application involved in this appeal.

(3) Status of Claims

The statement of the status of claims contained in the Second Appeal Brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the Second Appeal Brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the Second Appeal Brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the Second Appeal Brief is correct.

(8) Evidence Relied Upon

5,528,222	MOSKOWITZ ET AL.	6-1996
5,484,997	HAYNES	1-1996
5,495,250	GHAEM ET AL.	2-1996
5,850,217	COLE ET AL.	12-1998
5,640,002	RUPPERT ET AL.	6-1997

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6,308,542	BOLTON ET AL	10-2001
5,552,790	GUNNARSSON	9-1996

THE BANK CREDIT CARD BUSINESS, 2nd Edition, American Banker's Association ("ABA"), 1996.

GIBILISCO, The Illustrated Dictionary of Electronics, 6th Edition, 1994.

THE IEEE STANDARD DICTIONARY OF ELECTRICAL AND ELECTRONICS TERMS, 6th Edition, IEEE, 1996.

Applicants' "Exhibit A" filed November 12, 2004, Definition of Passive Transponder.

(9) Grounds of Rejection

The following grounds of rejection are applicable to the appealed claims:

Withdrawn Rejections

1. The rejections of claims 30 and 36 under 35 U.S.C. §112, 2nd paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention are hereby withdrawn. In other words, the following rejections are withdrawn:

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- a. From the Final Office Action, the rejection in paragraphs 6. a. is hereby withdrawn.
 - b. From the Final Office Action, the rejection in paragraphs 6. d. is hereby withdrawn.
2. The rejection of claims 26, 28-33, and 35-40 under 35 U.S.C. §102(e) as being anticipated by Haynes (U.S. 5,484,997) are hereby withdrawn.
3. The rejection of claims 26, 28-33, and 35-40 under 35 U.S.C. §103(a) as being obvious over Haynes (U.S. 5,484,997) in view of ABA is hereby withdrawn.

Claim Rejections - 35 USC §112 2nd Paragraph

4. Claims 30 and 31-33 are rejected under 35 U.S.C. §112, 2nd paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
5. In claim 31, it is unclear if “RFID transponder identification information” is the same or different from “at least some RFID transponder identification information” as recited in claim 26. This is the same rejection as stated in the Final Office Action, paragraph 6. b.
6. In claim 32, it is unclear if “RFID transponder identification information” is the same or different from “at least some RFID transponder identification information” as recited in claim 26. This is the same rejection as stated in the Final Office Action, paragraph 6. d.

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7. The rejections of claims 31 and 32 above involve the same issue: is "some RFID transponder identification information" the *same* "RFID transponder identification information" as recited in claim 26, or alternatively, is it a *second* set of "RFID transponder identification information?" On one hand, if the recitations in claims 31 and 32 of "RFID transponder identification information" was intended to be the *same* as recited in claim 26, Applicants would have amended their claim and used "said" or "the" 'at least some RFID transponder identification information.' On the other hand, if Applicants intended to the two to be different, Applicants could have delineated the information by stating perhaps 'a first set of RFID transponder identification information' in claim 26 and 'a second set of RFID transponder identification information' in claims 31 and 32.

Why Doesn't Applicants Just Amend the Claims?

8. Applicants are reminded the courts do not redraft claims. See, e.g., *Chef Am., Inc. v. Lamb Weston, Inc.*, 358 F.3d 1371, 1374, 69 USPQ2d 1857, 1859 (Fed. Cir. 2004) (repeating the well-established rule that “courts may not redraft claims”).

Moreover, Applicants are reminded that its “[i]t is the applicants’ burden to precisely define the invention, not the PTO’s.” *In re Morris*, 127 F.3d 1048, 1056, 44 USPQ2d 1023, 1029 (Fed. Cir. 1997) quoting 35 U.S.C. §112 2nd paragraph. The Examiner simply asks, why haven't Applicants' amended their claims to include "the" before the claimed "some RFID transponder identification information?"

9. Nevertheless, because Applicants have elected to appeal and *not* amend their claims to recite "said" or 'the RFID transponder identification information,' the Examiner has no choice but to start with the presumption that the two sets of information are different. It is the Examiner's position that had Applicants actually recited e.g. 'receiving **the** RFID transponder information' in claims 31 and 32, the 35 U.S.C. §112, 2nd paragraph rejections would have been withdrawn.

10. In similar situations and regardless of whether a reviewing body upholds the 35 U.S.C. §112, 2nd paragraph rejections, examiners have two choices:

(1) Follow the claim language and assume the two sets of information are different. Under this approach, the prior art is applied as if the two sets of information are different. This is the best choice because it provides the best application of the prior art to the claims; or

(2) Assume that the two sets of information are the same. In this case, the second reference to the information being the account number is not needed. When applying the prior art, the reference to "account number" is not needed since the Examiner can rely on 'name' or 'expiration date' as applied to claim 26.

11. In this particular application, the Examiner addressed the prior art with (1) above. This way, no matter how a reviewing body finds, the Examiner has addressed the limitation using the prior art and the prior art rejection should be affirmed. Conversely, the Examiner notes that if he addressed the prior art with choice (2) (assuming the two sets of information were the same) and a reviewing body held that the information was different, the examiner would not have a proper prior art rejection for claims 31 and 32. The application would then be remanded and prosecution reopened further delaying prosecution.

12. To avoid this reopening, the most logical choice is choice (1). Thus this is why it is always prudent (and safest) for examiners in similar situations to apply the prior art as if the two sets of information were different.

Ex Parte Examination Has a Lower threshold of Indefiniteness

13. Applicant s are reminded that the USPTO used a lower threshold showing of ambiguity to support a finding of indefiniteness.

The USPTO is justified in using a lower threshold showing of ambiguity to support a finding of indefiniteness under 35 U.S.C. § 112, second paragraph, because the applicant has an opportunity and a duty to amend the claims during prosecution to more clearly and precisely define the metes and bounds of the claimed invention and to more clearly and

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precisely put the public on notice of the scope of the patent. *Ex parte Miyazaki*, 89 USPQ2d 1207, 1212-13 (B.P.A.I. 2008).

14. The Examiner finds that because claims 31 and 32 are indefinite under 35 U.S.C. §112 2nd paragraph, it is impossible to properly construe the scope of these claims at this time. See *Honeywell International Inc. v. ITC*, 68 USPQ2d 1023, 1030 (Fed. Cir. 2003) ("Because the claims are indefinite, the claims, by definition, cannot be construed."). However, in accordance with MPEP §2173.06 and the USPTO's policy of trying to advance prosecution by providing art rejections even though these claim are indefinite, the claims are construed and the art is applied *as much as practically possible*.

Claim Rejections - 35 USC §102

15. Claims 26, 28-33, and 35-40, as understood by the Examiner, are rejected under 35 U.S.C. §102(e) as being anticipated by Moskowitz et. al. U.S. 5,528,222) ("Moskowitz").

16. It is the Examiner's position that evidence to support the anticipation rejection is Moskowitz and at least the American Banker's Association textbook titled "The Bank Credit Card Business." As stated in the Final Rejection mailed October 26, 2005, the Examiner noted:

10. It is the Examiner's position that for anticipation, an examiner can combine that what is old and well known in the art in combination with a reference. "A reference anticipates a claim if it discloses the claimed invention 'such that a skilled artisan could take its teachings in combination with his own knowledge of the particular art and be in possession of the invention. [Emphasis in original.]" *In re Graves*, 69 F.3d 1147, 1152, 36 USPQ2d 1697, 1701 (Fed. Cir. 1995) citing *In re LeGrice*,

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301 F.2d 929, 936, 133 USPQ 365, 372 (CCPA 1962) and noting that regarding the claimed "simultaneously monitoring the selected multiple connection points," the prior art "nevertheless anticipates [the claimed invention], even if it does not specifically disclose simultaneous monitoring of the output points, if simultaneous or parallel monitoring is within the knowledge of a skilled artisan." *Graves*, 69 F.3d at 1152, 36 USPQ2d at 1701. See also *Helifix Ltd. v. Blok-Lok, Ltd.*, 208 F.3d 1339, 1347, 54 USPQ2d 1299, 1304 (Fed. Cir. 2000) (noting that "The brochure might nevertheless be anticipating if a person of ordinary skill in the art would understand the brochure as disclosing elements (8)-(10) and if such a person could have combined the brochure's description of the invention with his own knowledge to make the claimed invention."); and *In re Donohue*, 766 F.2d 531, 533, 226 USPQ 619, 621 (Fed. Cir. 1985) ("Such possession is effected if one of ordinary skill in the art could have combined the publication's description of the invention with his own knowledge to make the claimed invention," citing *In re LeGrice*, 301 F.2d at 939, 133 USPQ at 373-74.). [Final Office Action mailed October 25, 2005, Paper No. 20050929, Paragraph Nos. 8-10, pp 3-6.]

17. In light of *In re Graves* and the reasoning above, the critical question becomes: in addition to Moskowitz, what evidence does the Examiner provide to show "knowledge of the particular art?" In this rejection, the Examiner relies on (1) The Bank Credit Card Business by the American Bankers Association (hereinafter "ABA") and (2) Applicants' admission as the 'knowledge of the particular art.'

18. It is the Examiner's principle position that the claims are anticipated because Moskowitz in addition to the knowledge of ordinary skill in the art discloses all claim limitations. In other words, the **only** elements missing from Moskowitz is what Applicants have either expressly admitted to is old and well known in the art, or what is disclosed in ABA.

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Moskowitz:

19. Moskowitz discloses an radio frequency transponder or tag **1120** having a radio frequency identification ("RFID" or "RF ID") in a standard credit card **1210** (See Figure 12 and C7, ~L21-32). "The tag consists of a semiconductor chip having RF circuits, logic, and memory." C1, ~L21. Credit card 1210 is an ISO Standard credit card.

20. Moskowitz discloses a method of authorizing transponder-enabled transactions, comprising (Note: Bold and italicized text below at the beginning of each paragraph is actual claim language):

21. ***Receiving by a transponder server*** (authorization server) ***of a credit network*** (Inherent in the "data processor" in credit card network). In response to a 35 U.S.C. §112 1st paragraph rejection that "receiving by a transponder server of ... a credit network" was not disclosed in the original specification, Applicants expressly admitted the following:

Those of ordinary skill in the art know that credit card transactions are authorized by the issuing bank or the financial institution that issued the credit card, or else by a data processor which performs that service on behalf of the issuing bank. Such issuing banks and/or financial institutions are typically part of credit networks. See Remarks filed April 8, 2004, Section IV, pp 9-12) (hereinafter "First Admission").

22. After receiving the First Admission and an appeal brief filed June 17, 2004, the Examiner confirmed Applicants' admission and subsequently relied on Applicants' First Admission in the next Office Action. In particular, the Examiner expressly stated:

§112 1st Paragraph and New Matter

...

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17. In the previous office action [], the Examiner noted that Applicants' original filed specification did not disclose "receiving by a transponder server of at least one issuing bank ... at least some transponder information "

18. Applicants First Appeal Brief states that "Those of ordinary skill in the art know that credit card transactions are authorized by the issuing bank or financial institution that issued or acquired the credit card account Such issuing banks and/or financial institutions are typically part of credit networks."¹ Because one of ordinary skill in the art knows that credit card transactions are authorized by an issuing bank, the Examiner finds that any credit card transaction must be "of" or associated with its issuing bank. Because such features are inherent in all credit transactions (thus including Applicants'), this particular 35 U.S.C. 112 1st paragraph rejection is hereby withdrawn. [Office Action mailed Sept 23, 2004, Pg 10.]

23. In light of the above, the Examiner relies on 37 C.F.R. §1.104(c)(3) which states in part: "the examiner may rely upon admissions by applicant . . . as to *any matter* affecting patentability [Emphasis added.]" Applicants' arguments are clear evidence that the above admission clearly affects patentability. The Examiner has and continues to rely on this admission to establish patentability.

24. Finally, **Applicants received actual notice** that if Applicants disagreed with any finding of fact or conclusion of fact, they should (in accordance with 37 C.F.R. § 1.111(b)) bring the issue to the attention of the Examiner. See the office actions mailed: March 3, 2003, paragraph no. 24; January 21, 2004, paragraph no. 22; September 13, 2004, paragraph no. 25; April 20, 2005, paragraph no 42; and October 26, 2005, paragraph no. 45 where Applicants were expressly reminded of their duties under 37 C.F.R. § 1.111(b).

25. Because Applicant received actual notice that the Examiner relied on Applicants' admissions, because Applicants were given actual notice of their

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requirements under 37 C.F.R. § 1.111(b), because Applicants did not contest the admissions, and because the Examiner gave actual notice of his reliance on these admissions, Applicants should not be able to 'take back' their admissions. In other words, the only elements missing from the prior art is what Applicants have expressly admitted to is old and well known in the art or what is disclosed in ABA.

26. ***At least some RFID transponder identification information*** (credit card owner's name, or alternatively, the expiration date of the credit card) ***emitted from an RFID transponder***. The 'ID' or 'identification' information stored in the RFID credit card must or inherently include a credit card owner's name, expiration date, and account number. Moskowitz directly states that "[T]his allows information on the RF tag to be used for personal identification." (Moskowitz C7, ~L36-37). If Moskowitz did not include at least this information, the evidence of record shows that it would be impossible to perform a credit card transaction.

27. For purposes of this rejection, the Examiner interprets the ***RFID transponder identification information*** as the credit card owner's name, or alternatively, the expiration date of the credit card and not the account number. The Examiner finds that a credit card owner's name is identification information that identifies the transponder. The name identifies the credit card account and the credit card). Such information *must* be present in the RFID credit card since the evidence of record clearly indicates that

¹ Applicants' First Appeal Brief, June 17, 2004, Page 10, -lines 8-12.

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such information is required for an ordinary credit card transaction. In other words, but for the credit card owner's name and/or expiration date, the credit card transaction could not occur.

28. ***Substantially upon presentation of both the RFID transponder and a transaction for payment at a point of sale device.*** The RFID credit card is presented at a point of sale device when attempting to pay for a transaction at e.g. a merchant's store.

29. ***The payment comprising a payment amount.*** Inherent since payments by definition *must* have a payment amount.

30. ***Retrieving from an account table*** (the credit card record on file at the credit card company) ***at least some financial account information*** (account balance information) ***linked to the RFID transponder identification information.*** The user's account balance is clearly linked to their name. In fact, the Examiner finds that all information within the credit card owner's credit record is linked to the other information. In particular, the Examiner finds that the owner's name is linked to the credit card account. Additionally, the Examiner finds that the credit card expiration date is clearly linked to the credit card account. Although the information may or may not be directly linked, all the information in a user's credit card account is nevertheless linked since the

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linking provides context and adds value to the information. For example, expiration date alone is of no consequence unless it is linked to a particular credit card account.

Account balance alone is of no value unless linked to a credit card account.

31. ***The financial account information comprising at least one of ... account balance information.*** The processing bank during the transaction checks the available balance to determine if there are sufficient funds. See ABA page 76, balloon #3 as evidence that the bank tracks "available credit."

32. ***Determining by an authorization unit for charging at least some of the payment amount to a financial account represented by the financial account information based on the payment amount and at least some of the financial account information; and communicating authorization to the point of sale device.*** See ABA, page 75 which states "The transaction is either declined or approved, with the information then relayed to the store clerk and the bank that issued the card."

33. ***Wherein the RFID transponder Identification information does not comprise account number information.*** The transponder Identification information is the credit card holder's name, or alternatively, the credit card expiration date. It is not the account number. It is the Examiner's position that *during the transaction*, 'but for' the user's name and/or credit card expiration date, the credit card account will not be identified.

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The Examiner admits that outside of a transaction (e.g. when calling the credit card number's 800 to report a lost card), it may be possible to identify the account with only the account number. However *during the transaction*, the record is clear that the transaction will not be approved since the account can be accurately identified without the name and expiration date.

34. It is the Examiner's principle position that the claims are anticipated because Moskowitz in addition to the knowledge of ordinary skill in the art discloses all claim limitations.

35. If the Board reverses the 102 rejection, the Examiner requests reasons as to why *In re Graves* does not apply.

Alternative Claim Rejections - 35 USC §103

36. Claims 26, 28-33, and 35-40, as understood by the Examiner, are *alternatively* rejected under 35 U.S.C. §103(a) as being unpatentable over Moskowitz in view of the The Bank Credit Card Business by the American Bankers Association (hereinafter "ABA").² It is the Examiner's principle position that the claims are anticipated because a standard credit card transaction is inherent in the credit card discussed in Moskowitz.

37. It is the Examiner's position that ABA describes how a basic credit card transaction occurs. In particular, ABA directly discloses how point of sale terminal ("POS") processes credit cards. See *Sales Draft Processing* and *Statement Processing*

² See MPEP §2112 expressly authorizing alternative §102/§103 rejections when the question of inherency is present in the anticipation rejection.

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ABA, pp 72-81. ABA also directly discloses that bank tracks transactions including account number (Exhibit 6.9, upper left hand corner); credit limit (Exhibit 6.9, #2); available credit (Exhibit 6.9, #3); and balance (Exhibit 6.9, #20).

38. Therefore if not inherent, it would have been obvious to a person having ordinary skill in the art at the time the invention was made to modify Moskowitz as taught by ABA to include a description of an ordinary credit card transaction. Such a modification would have showed the natural result flowing from the operation as taught which is how the credit card user in Moskowitz would have used his or her RFID credit card.

Additional Examiner Findings of Fact and Conclusions of Law:

39. Credit card authorization at a retail establishment is very old and well known in the art. See *e.g.* Cole et. al. (U.S. 5,850,217) ("Cole") C1, L26 through C2, L6 which discusses the standard authorization process and Figure 3 for an old and well known credit card receipt; see also Ruppert et. al. (U.S. 5,640,002) ("Ruppert") C32, L45 through C33, L3.

40. The Examiner finds that during an ordinary credit card transaction, at least the credit card number, user name or card holder's name, and expiration date are electronically captured and transmitted during an ordinary credit card transaction. See Ruppert C32, ~L55-67.

41. It is the Examiner's position that the only difference between a known prior art credit card and the claimed invention is that Applicants use RFID instead of a prior art magnetic strip.

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42. Moreover, during the typical credit card authorization process well known to those skilled in the art, the credit card provides at least the credit card account number, the name of the card holder or user name, and expiration date. See *e.g.* Ruppert, C32 L58-66; and ABA, pp 66, #4. Finally, it is old and well known in the art that the merchant must also send the order total and the merchant identification number to the authorization center before the merchant can receive the authorization code. See *e.g.* Ruppert, C34 L39-44. ABA page 75.

43. For due process purposes and because Applicants have not objectively indicated and redefined claim limitation(s) to have meanings other than their ordinary and accustomed meanings, the Examiner again confirms that Applicants have decided not to be their own lexicographer. To support this position, the Examiner again notes the following factual findings as first discussed in the previous Office Actions.³ First, the Examiner has again carefully reviewed the specification and prosecution history and can not locate any lexicographic definition(s). Second, the Examiner finds that not only have Applicants not pointed to definitional statements in their specification or prosecution history, Applicants have also not pointed to a term or terms in a claim with which to draw in those statements⁴ with the required clarity, deliberateness, and

³ See the First Non Final Office Action mailed May 16, 2002, Paragraph No. 13; the First Final Office Action mailed August 29, 2002, Paragraph No. 12; the Second Non Final Office Action mailed March 4, 2003, Paragraph No. 13; the Second Final Office Action mailed January 21, 2004, Paragraph No. 12; and the Third Non Final Office Action mailed April 20, 2005, Page 9, Paragraph No. 22.

⁴ "In order to overcome this heavy presumption in favor of the ordinary meaning of claim language, it is clear that a party wishing to use statements in the written description to confine or otherwise affect a patent's scope must, *at the very least*, point to a term or

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precision.⁵ Third, after receiving express notice of the Examiner's position that lexicography is *not* invoked,⁶ Applicants' responses have not point out the "supposed errors" in the Examiner's position regarding lexicography invocation in accordance with 37 C.F.R. §1.111(b) (*i.e.* Applicants did not argue lexicography *was* invoked). Forth and to be sure of Applicants' intent, the Examiner also notes that Applicants have declined the Examiner's express invitation⁷ to be their own lexicographer. Finally, after receiving express notice of the preceding factual findings and conclusions, Applicants' latest response again fails to point out the supposed errors in the Examiner's position regarding lexicography invocation in accordance with 37 C.F.R. §1.111(b). Moreover, Applicants' latest response—while fully considered by the Examiner—does not change the Examiner's reasonable conclusion that Applicants have decided not to be their own lexicographer. Therefore (and unless expressly noted otherwise by the Examiner), the

terms in the claim with which to draw in those statements. [Emphasis added.]" *Johnson Worldwide Assocs. v. Zebco Corp.*, 175 F.3d 985, 989, 50 USPQ2d 1607, 1610 (Fed. Cir. 1999).

⁵ "The patentee's lexicography must, of course, appear 'with reasonable clarity, deliberateness, and precision' before it can affect the claim." *Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1249, 48 USPQ2d 1117, 1121 (Fed. Cir. 1998) citing *In re Paulsen*, 30 F.3d 1475, 1480, 31 USPQ2d 1671, 1674 (Fed. Cir. 1994).

⁶ See Note 3.

⁷ See *e.g. Fuji Photo Film Co. v. ITC*, 386 F.3d 1095, 72 USPQ2d 1769, 1773 (Fed. Cir. 2004) (noting that applicants' failure to correct an examiner's characterization of an element of claim interpretation is nevertheless an indication of how a claim should be interpreted since applicant declined the examiner's express invitation to correct a possible error in claim interpretation: "applicant's attention was called to the examiner's interpretation of [how the element was interpreted by the examiner, and] applicant was invited to correct the examiner's interpretation—an invitation the applicant did not accept."

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heavy presumption in favor of the ordinary and accustomed meaning for claim terminology is confirmed. Accordingly, the claims continue to be interpreted with their “broadest reasonable interpretation,” *In re Morris*, 127 F.3d 1048, 1054, 44 USPQ2d 1023, 1027 (Fed. Cir. 1997), and the Examiner continues to rely heavily and extensively on this interpretation.⁸

44. **No Product-by-Process Claims:** Because the claims recite method steps, these claims are NOT product-by-process claims. See also Final Office Action mailed October 26, 2005, Paper No. 20050925, Page 13, Paragraph No. 22.

45. **No Means Plus Function:** Because none of the claims on appeal recite “means for,” the claims fail Prong (a) as set forth in MPEP 2181. Because all claim limitations on appeal fail prong (a), the Examiner concludes that all claims on appeal do *not* invoke 35 U.S.C. 112, 6th paragraph.

46. **Claims are Construed as Open:** From the Final Office Action mailed October 26, 2005, Paper No. 20050929, paragraph no. 23, page 13-14:

23. Because Applicants use “comprising” in line 2 of method claim 26, the Examiner interprets claim 26 (and all dependent claims therefrom) as having an “open” transitional phrase. “The transition ‘comprising’ in a method claim indicates that the claim is open-ended and allows for additional steps.” *Invitrogen Corp. v. Biocrest Mfg., L.P.*, 327 F.3d 1364,

⁸ See 37 C.F.R. §1.104(c)(3) which states in part: “the examiner may rely upon admissions by applicant . . . as to *any matter* affecting patentability [Emphasis added.]”

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1368, 66 USPQ2d 1631, 1364 (Fed. Cir. 2003)(citations omitted). See also MPEP §2111.03.

47. Under the broadest reasonable interpretation, the Examiner hereby adopts the following definitions as stated in the Office Action mailed September 13, 2004, paragraphs 17(a)-j, pp 11-13.

48. **ABA is evidence of basic knowledge to one of ordinary skill in the art:**

From the Office action mailed April 4, 2005, paragraph no. 41, pages 15-16:

41. Also [i]n accordance with *In re Lee*, 277 F.3d 1338, 1344-45, 61 USPQ2d 1430,1434-35 (Fed. Cir. 2002), the Examiner finds that the reference The Bank Credit Card Business by the American Bankers Association (hereinafter "ABA") is additional evidence of what is basic knowledge or common sense to one of ordinary skill in this art. The Examiner finds that ABA is a textbook that introduces the reader to the dynamic bank credit card business. The reference is cited in its entirety. Moreover, because the reference's general description of the credit card business, because of the reference's basic content which is self evident upon review of the reference, and after further review of the entire record including the prior art now of record in conjunction with the factors as discussed in MPEP §2141.03 (where practical), the Examiner finds that ABA is primarily directed towards those of low skill in this art. Because ABA is directed towards those of low skill in this art, the Examiner finds that one of ordinary skill in this art must--at the very least--be aware of and understand the knowledge and information contained within ABA.

(10) Response to Argument

49. Regarding Applicants arguments regarding timeliness, The Board does not have subject matter jurisdiction on this issue.

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35 U.S.C. §112 2nd Paragraph Rejections:

50. Applicants argue on page 11 of their brief that the 35 U.S.C. §112 2nd paragraph rejection should be withdrawn because it is not timely.

51. Examiner's response: First, whether or not the rejection is timely is a not before the Board. It is the Examiner's position that the Board does not have subject matter jurisdiction on this matter.

52. "The invention disclosed in [Applicant's] written description may be outstanding in its field, but the name of the game is the claim." *In re Hiniker Co.*, 150 F.3d 1362, 1369, 47 USPQ2d 1523, 1529 (Fed. Cir. 1998).

53. Applicants argue that the 35 U.S.C. §112 2nd paragraph rejection should be withdrawn because the term "has proper antecedent basis." Second Appeal Brief page 12. Applicants also argue on page 4 of their First Reply Brief that "metes and bounds of the claim are discernable to one of ordinary skill in the art." Applicant goes on to argue in the First Reply Brief that "[c]laims 31 and 32 are directed to how RFID transponder information is received from the transponder. Id.

54. Examiner's response: The Examiner respectfully disagrees. The Examiner agrees that there is no bright line rule and that failure to provide proper antecedent

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basis does not automatically make the claim indefinite. See MPEP §2173.05(e).

However, like this case, where there are two possible reasonable alternative interpretations that differ in scope, the claim are indefinite.

If the scope of the invention sought to be patented is unclear from the language of the claim, a second paragraph rejection will properly lie. . . . However, we agree with the examiner that appellants' interpretation of the scope of the claim is but one possible construction and that other ... constructions are possible that are not unreasonable in light of the words of the claims. *In re Wiggins*, 488 F.2d 538, 179 USPQ 421, 423 (CCPA 1973) (citations and quotations omitted).

55. Applicants argument as to the claimed being directed to "how" the RFID transponder information is received and not whether the RFID transponder information is directed to the same or different information missed the point. It is as if Applicants are arguing that the claims are not indefinite because we didn't mean the claim to be interpreted as written. While Applicants may or may not have personally intended the claims to mean one thing or another, it is nevertheless the claim words that measure the invention.

56. The Doctrine of antecedent basis requires the subsequent term to make clear that it is referring to the previous term. It is the Examiner's position that Applicants have not made this clear in the claim language. Moreover, simply because Applicants *could* have corrected the indefiniteness by inserting "said" or "the" does not make claim any less indefinite. "[S]emantic indefiniteness of claims is not rendered unobjectionable merely because it *could* have been corrected. [Emphasis in original.]" *Allen Engineering Corp. v. Bartell Industries Inc.*, 299 F.3d 1336, 1349, 63 USPQ2d 1769, 1776 (Fed. Cir. 2002) (citations and quotations omitted). Because Applicants had an

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opportunity to file an amendment, the Examiner sees no reason why Applicants simply do not amend the claims.

57. Finally, the Examiner notes that Applicants have not presented any arguments as to *why* the well established doctrine of antecedent basis should not apply in this situation.

Prior Art Rejections:

58. Applicants argue on page 16, that because the Examiner stated that for claim 31, the "RFID transponder identification information" is the account number, this should also apply to claim 26.

59. Examiner's response: Applicants argument however missed the point that for purposes of applying the prior art (and in light of the indefiniteness rejection), ***the Examiner assumed the two are different.*** If the two are different, claim 31 (like claim 26) should be affirmed. And if the two are the same as Applicants seem to argue, claims 26 and 31 should be affirmed as well since the Examiner is relying on the 'name' or 'expiration date.' See the discussion of 112 2nd paragraph rejections above.

60. Applicants' arguments fail to consider the indefiniteness rejections and the two alternative ways claims 31 and 32 can be interpreted. Either way, it is the Examiner's position that the prior art discloses the claimed elements.

61. Applicants argue: Under the principles of claim construction, the same claim term "RFID transponder identification information" should be given the same construction

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in claims 26 and 31, and therefore the limitation in claim 31 of "RFID transponder identification information" does not comprise "account number information."

62. Examiner's Response: Applicant is reminded that when referring to an antecedent, proper claim drafting requires identifying the antecedent term or phrase with "the" or "said" or otherwise indicating in the claim that the claim drafter intends to refer to the previous term or phrase.

63. The Examiner also notes that in claim 31, Applicants expressly recited "the RFID transponder." This phraseology makes it clear that "the RFID transponder" is the same transponder as previously recited. And again, Applicants elected **not** to recite 'the RFID transponder information.'

64. Applicants argue on page 12 that in an ordinary credit card transaction, the account number is received by the transponder server.

65. Examiner's response: The Examiner agrees. However, Applicants are reminded that claim 26 has the transitional phrase of "comprising." So in addition to sending the RFID transponder identification information such as name or expiration date, the system also sends the account number. Applicants choice of the transitional phrase "comprising" allows for the sending of additional information such as account number. So again, for purposes of the prior art rejections, the "account number" in the prior art **IS NOT** the claimed 'identification information.' See Table 1.

66. Applicants argue on page 13 that "the Examiner makes no argument that the 'at least some credit card information' that is received by a transponder server of the

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Examiner and linked to retrieved financial account information that is then used to authorize a transaction does not comprise account information."

67. Examiner's response: First, the claim requires account "number" information and not financial account information as argued. Second and again, **Applicants' choice of the transitional phrase "comprising" allows for sending additional information.**

So just because the account number is sent, it does not overcome the anticipation and obviousness rejections because Applicants' claim allows for additional information (such as account number) to be sent to the transponder server. Applicants' arguments would have merit if they had chosen to use the closed transitional phrase "consisting of." But because they used "comprising," providing the account number or any other information not included within the claim can not overcome the prior art rejections.

68. In other words, Applicants' primary argument is that they are not transmitting an account number. However 'not transmitting an account number' is not in the claim. Applicants claim states that a particular piece of information is not the account number. Thus, there is nothing in Applicants' claims that prevents the sending of additional information to the authorization server such as 'account number.'

69. Paragraph 23 of the Final office action gave Applicants actual notice on the Examiner's position on transitional phrases. Applicants appeal brief does not address the issue. Because Applicants received actual notice and because Applicants have elected not to address the issue, the application of open transitional phrases is interpreted as an admission. The Examiner hereby relies on this admission.

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70. **Using and "Linked" Are Not The Same.** Applicants' arguments have assumed that the claim has the term "using" while the Examiner has examined the claims as stated--with the term "linked." The Examiner agrees that if the claim actually stated "using," the rejection is improper. However the claim language states that the information is "linked to the RFID transponder identification information." The Examiner finds that all information within a customer's account is "linked." To support this position, see e.g. ABA's Exhibit 6.9 on page 76. Information may be linked in a number of ways, one of which is through the customer's name or Cardholder name. For example, all information in ABA's Exhibit 6.9 is "linked" together via the Cardholder name.

71. Regarding Applicants' discussion of functional limitations, the Examiner agrees. In fact, the Examiner has evaluated and considered all functional language. Because the Examiner has evaluated and considered all functional language, this issue is not in dispute. See the Final Office action, paper no. 20050929, mailed October 26, 2005, paragraphs 33 and 34.

72. For purposes of this appeal (and this appeal only), the definition of transponder is not in dispute since Moskowitz directly discloses transponder **1220**.

73. Applicants argue on page 24 that claims 37 and 38 are separately patentable because "the Examiner makes the unsupported statement that 'embedding transponders in keys' is old and well known in the art."

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74. Examiner's response: The Examiner disagrees since the Examiner's position is supported by some of the best evidence in the prosecution history: ***Applicants' own admission*** and the prior art of Bolton (U.S. 5,308,542 B1) and Gunnarsson (U.S. 5,552,790). In fact, it was *Applicants* who provided the Bolton and Gunnarsson references.

75. In the Office Action mailed August 29, 2002 (Paper No. 12), the Examiner rejected claims 24 and 25 under 35 U.S.C. §112 1st paragraph because the *newly added* claims did not have 35 U.S.C. §112 1st paragraph written description support. In particular, the Examiner rejected, inter alia, claim 24 because the phrase “wherein the personal article comprises a transaction card” was new matter. Likewise, the Examiner also rejected claim 25 because the phrase “wherein the personal article comprises a transaction key” was also new matter.

76. In response Applicants filed an amendment on November 20, 2002. In particular, Applicants argued that “embedding transponders in keys is old and well known in the art” and that “embedding of transponder in plastic cards substantially the shape and size of a credit or transaction cards is well known in the art.”

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77. In response to Applicants' express admission filed November 20, 2002, the Examiner's next office action (March 4, 2003, Paper No 17), the Examiner withdrew the 35 U.S.C. §112 1st paragraph rejection. They expressly stated:

18. Regarding the §112 1st paragraph rejections, Applicants argue that "embedding transponders in keys is old and well known in the art." Applicants also argue "embedding of transponder in plastic cards substantially the shape and size of a credit or transaction cards is well known in the art." As evidence of their position, Applicants cite Bolton (U.S. 5,308,542 B1) and Gunnarsson (U.S. 5,552,790) respectively. Because the Examiner adopts Applicants' positions, the §112 1st paragraph rejections are hereby withdrawn.

(a). Furthermore, the withdrawal of the §112 1st paragraph rejection is predicated upon the Examiner's interpretation that Applicants' response as an admission. ***The Examiner will rely upon Applicants' admissions for prior art purposes.*** Specifically, the withdrawal of the §112 1st paragraph rejection is predicated upon the Examiner's interpretation that such missing elements are old and well known in the art and not that they would have been obvious to one of ordinary skill in the [art] when viewed in light of Applicants' specification. "Entitlement to a filing date does not extend to subject matter which is not disclosed, but would be obvious over what is expressly disclosed. It extends only to that which is disclosed." *In re Huston*, 308 F.3d 1267, 1277, 64 USPQ2d 1801, 1807 (Fed. Cir. 2002) citing *Lockwood v. Am. Airlines Inc.*, 107 F.3d 1565, 1571-72, 41 USPQ2d 1961, 1966 (Fed. Cir. 1997). [Emphasis added.]⁹

78. In the very next response to the office action noted above (*i.e.* Applicants' response filed June 4, 2003), Applicants expressly acknowledged that the 35 U.S.C. § 112, first paragraph had been withdrawn. In particular, Applicants expressly state, "In paragraph 18, the Examiner notes that the previous rejection under 35 U.S.C. § 112, first paragraph is withdrawn, . . . Applicants thank the Examiner for this

⁹ Office Action mailed March 4, 2002, Paper No. 17, Paragraph No. 18, page 10.

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consideration.”¹⁰ As clearly indicated above, Applicants did not challenge any of the Examiner's statements or positions but instead thanked the Examiner for withdrawing the rejections.

79. In light of the above, the Examiner's position that 'embedding transponders in keys is old and well known in the art' can hardly be considered 'unsupported' as Applicants have argued. **Should Applicants continue this argument, the Examiner respectfully suggests the Board consider re-applying the 35 U.S.C. § 112, first paragraph rejections (that were previously withdrawn) for the appropriate claims.**

80. Additionally, Applicants seem to be arguing a position that is completely opposite of the position taken above in Applicants' express admission filed November 20, 2002. That is, Applicant appears to be arguing that 'embedding transponders in keys' is *not* old and well known in the art. In light of Applicants' opposing arguments on this point, the Examiner hereby adopts the Doctrine of Quasi-estoppel.

81. Quasi-estoppel “is a seldom-utilized doctrine that appears predominately in tax cases.” *In re Baker Hughes Inc.*, 215 F.3d 1297, 1301, 55 USPQ2d 1149, 1152 (Fed. Cir. 2000)(internal citations omitted). The Federal Circuit first discussed quasi-estoppel during patent prosecution in *Baker Hughes*. *Id.* “Quasi-estoppel is also known as the ‘duty of consistency,’ it only applies when the earlier position amounts to a misstatement of fact, not of law Moreover, the misstatement must be one on which the government reasonably relied, in the sense that it neither knew, nor ought to have

¹⁰ See Applicants' Response filed June 4, 2003, pp 16-17.

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known, the true nature of the transaction mischaracterized by the taxpayer.” *Baker Hughes*, 215 F.3d at 1301-02, 55 USPQ2d at 1152 (internal citations omitted).

82. First, Applicants are reminded that “[t]he issue of whether a patent specification adequately describes the subject matter claimed is a question of fact.” *In re Alton*, 76 F.3d 1168, 37 USPQ2d 1578, 1580 (Fed. Cir. 1996). Second, the Examiner has clearly shown reliance on this question of fact. If the Board desires greater discussion on this topic, the Examiner would be happy to address these in a subsequent answer.

83. Finally, regarding the anticipation rejection with Moskowitz, the Examiner admits that the ABA is not in the statement of rejection. Should the Board decide to not consider the reference because ABA is not in the statement of the 102 rejection, the Examiner respectfully requests the Board to address the following issues:

84. To support the anticipation rejection, the Examiner also notes the following:

Consideration of References Not in the Statement of Rejection

85. USPTO examiners frequently receive decisions by the USPTO Board of Patent Appeals and Interferences (“Board”) stating that they will not consider references unless they are included in the statement of rejection. The Board states its position as follows:

“Where a reference is relied on to support a rejection, whether or not in a ‘minor capacity,’ there would appear to be no excuse for not positively including the reference in the statement of the rejection.” *In re Hoch*, 428 F.2d 1341, 166 USPQ 406, 407 n.3

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(CCPA 1970). See also Ex parte Raske, 28 USPQ2d 1304, 1305 (Bd. Pat. App. & Int. 1993).

86. The Examiner respectfully disagrees and kindly requests that the Board reconsider its position in light of the arguments below. Should the Board continue to not consider references that are absent from the statement of rejection as noted above, the Examiner respectfully requests that the Board address the following arguments.

87. No precedent for the Board's position

(1) The Board draws support for its position from dicta in In re Hoch. Dicta is not binding precedent; thus, the Board and examiners are not bound by it. Furthermore, the holding in Hoch did not rely on an external reference. Rather, the footnoted position (*i.e.* the dicta) was simply a proposition that was not relied upon to affirm the rejections.

(2) Neither the Court of the Customs and Patent Appeals ("CCPA") nor the Court of Appeals for the Federal Circuit ("Federal Circuit") have subsequently adopted the Board's position. The Examiner is unaware of any binding precedent from either court that adopts the Board's position. For this reason alone, the Board's position should not be persuasive.

(3) The Federal Circuit has not followed In re Hoch. In fact, the Federal Circuit has upheld the Board's conclusion of obviousness and used references that were *absent* from the statement of rejection. In re Huston, 308 F.3d 1267, 64 USPQ2d 1801, 1810-11 (Fed. Cir. 2002). The Federal Circuit held "[w]e sustain the Board based on its combination of the Wang and Fukushima references together with Dudley", even though

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the motivation to combine was in the "Paul" reference, which was absent from the statement of rejection. Id. at n.9. The Federal Circuit reasoned that the "Board's cryptic finding of a motivation to combine may be affirmed because it was supported in the record, even though the record reference was not quoted, just as a district court's factual finding may be sustained if supported by record evidence not specifically cited by the district court." Id.

Judge Prost dissented in the case, and argued that the case should be remanded to the USPTO so that it may include the "Paul" reference in the statement of rejection, thereby explicitly setting forth the USPTO's reasoning. Id. at 1811-12.

All Evidence Of Record Must Be Considered, Even If Such Evidence Is Absent From The Statement Of Rejection

(1) The USPTO applies the preponderance of evidence standard when making substantive patentability determinations. Therefore, the USPTO must consider all evidence of record, even if such evidence is absent from the statement of rejection. Otherwise, a factual determination, which does not consider all relevant evidence of record, may not be supported by the required substantial evidence because the relevant evidence that was not considered may be probative of the factual issue presented. See e.g. In re Piasecki and Meyers, 745 F.2d 1468, 223 USPQ 785, 787 (Fed. Cir. 1984) ("All the evidence on the question of obviousness must be considered"); In re Oetiker, 977 F.2d 1443, 24 USPQ2d 1443, 1444 (Fed. Cir. 1992) ("After evidence or argument is submitted by the applicant in response, patentability is determined on the totality of the

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record, by a preponderance of evidence with due consideration to persuasiveness of argument"); In re Glaug, 283 F.3d 1335, 62 USPQ2d 1151, 1152 (Fed. Cir. 2002) ("Patentability *vel non* is then determined on the entirety of the record, by a preponderance of evidence and weight of argument"); In re Rinehart, 531 F.2d 1048, 189 USPQ 143, 146 (CCPA 1976) ("Whether, in the light of all the evidence, the claimed method would have been obvious at the time the invention was made"); Medtronic, Inc. v. Daig Corp., 789 F.2d 903, 229 USPQ 664, 667 (Fed. Cir. 1986) ("We presume that a fact finder reviews all the evidence presented unless he explicitly expresses otherwise"); and Stratoflex, Inc. v. Aeroquip Corp., 713 F.2d 1530, 218 USPQ 871, 879 (Fed. Cir. 1983) ("It is jurisprudentially inappropriate to disregard any relevant evidence on any issue in any case, patent cases included"). It is the Examiner's position examiners and the Board would be violating the positions above if *only* the references in the statement of rejection were used to determine obviousness.

(2) The Board's position places an un-necessary burden on examiners if every piece of evidence considered must be placed in the statement of rejection. Under such a requirement, the rationale to combine references must be placed in the statement of rejection as well, even though MPEP § 2144 implies otherwise:

The rationale to modify or combine the prior art does not have to be expressly stated in the prior art; the rationale may be expressly or impliedly contained in the prior art or it may be reasoned from knowledge generally available to one of ordinary skill in the art, established scientific principles, or legal precedent established by prior case law.

Furthermore, statements concerning what is known in the field of the invention or well known in the art need not be explicitly stated in a patent reference in order to qualify as

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prior art and be considered. If such statements are considered evidence of record, then references not included in the statement of rejection should also be considered evidence of record for the same reason (e.g. to show the level of skill in the art). See S3 Inc. v. nVIDIA Corp., 259 F.3d 1364, 59 USPQ2d 1745, 1749 (Fed. Cir. 2001) ("The law is clear that patent documents need not include subject matter that is known in the field of the invention and is in the prior art"); Atmel Corp. v. Information Storage Devices, Inc., 198 F.3d 1374, 53 USPQ2d 1225, 1230 (Fed. Cir. 1999) ("The specification would be of enormous and unnecessary length if one had to literally reinvent and describe the wheel"); In re Buchner, 929 F.2d 660, 18 USPQ2d 1331, 1332 (Fed. Cir. 1991) ("The specification need not disclose what is well known in the art"); and In re Graves, 69 F.3d 1147, 36 USPQ2d 1697, 1701 (Fed. Cir. 1995) ("[a] reference anticipates a claim if it discloses the claimed invention 'such that a skilled artisan could take its teachings *in combination with his own knowledge* of the particular art and be in possession of the invention'"). In this application, the Examiner relies upon In re Graves, ABA, and Applicants' own admissions to establish anticipation. Clearly Applicants' own admissions are within their knowledge. Thus, the only remaining issue is did Applicants receive notice that ABA was within their own knowledge. Because the real party of interest is a bank and because they received actual notice, it is the Examiner's position that due process has not been violated. See paragraph number 41 above.

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Applicant Receives Notice Of Due Process Even If References Are Absent From The Statement Of Rejection

(1) While the statement of rejection provides notice of due process to the applicant, the statement of rejection is not the exclusive means of providing such notice. Please see the arguments above regarding knowledge available to one of ordinary skill in the art. Thus, an applicant may receive notice of due process even if references are absent from the statement of rejection.

(11) Related Proceeding(s) Appendix

Copies of the Board decision identified in the Related Appeals and Interferences section of this examiner's answer are available on the Patent Application Information Retrieval (PAIR) system.

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For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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APPENDIX

TABLE 1 – Claim 1 as Anticipated by Moskowitz

Clause No.	Claim 1	Moskowitz (U.S. 5,528,222)
1	A method of authorizing transponder-enabled transactions, comprising:	A method of Authorizing an “RF Tag” (1220) Enabled Transactions
2	Transponder	“RF Tag” 1220 in Figure 12 within “ISO standard credit card” 1210
3	Receiving by a transponder server of . . . a credit network	Receiving by an Authorization Server (The Server which checks the validity of credit card transactions) of a credit card network
4	At least some RFID transponder identification information	At least some 'Name' or 'Expiration Date' Information
5	Emitted from an RFID transponder	Emitted from RFID Transponder 1220
6	Substantially upon presentation of both the RFID transponder and a transaction for payment at a point of sale device	Substantially upon presentation of both RFID Transponder 1220 and a transaction at a Merchant POS device
7	The payment comprising a payment amount	The Payment amount is the dollar value charged to the credit account
7	Retrieving from an account table at least some financial account information linked to the RFID transponder identification information	Retrieving from a credit card record at least account balance information linked to the RFID transponder Name or Exp. Date.
8	the financial account information comprising at least one of . . . , account balance information	the financial account information comprising at least one of . . . , account balance information

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Clause No.	Claim 1	Moskowitz (U.S. 5,528,222)
9	determining by an authorization unit authorization for charging at least some of the payment amount to a financial account represented by the financial account information based on the payment amount and at least some of the financial account information;	After retrieving account balance information, the system checks to see if the purchaser has sufficient funds (<i>i.e.</i> the system checks to see if the purchase amount exceeds either the credit balance available or a maximum credit value). If sufficient funds, authorize the transaction. If insufficient funds, decline transaction
10	and communicating authorization to the point of sale device,	Send authorization (or notice to decline) to the POS Device
10	wherein the RFID transponder identification information does not comprise account number information.	The RFID transponder identification information is the Expiration Date or Name of the Card Holder

Table 1: Claim 1 and Moskowitz